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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DONALD I. METCALF et al., Plaintiffs and Appellants, v. NASH & EDGERTON et al., Defendants and Respondents.	B171322 (Los Angeles County Super. Ct. No. BC297610)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lee Smalley Edmon, Judge. Affirmed.

James A. Shalvoy for Plaintiffs and Appellants.

Isaacs Clouse & Crose and John A. Crose, Jr.; Nash & Nash and Shelley Nash for Defendants and Respondents.

This is a malicious prosecution action in which the trial court granted the defendant's motion to strike the complaint. (Code Civ. Proc., § 425.16.) We affirm.

FACTS

A.

In the early 1990's, Donald I. Metcalf and his wife (who is included in our references to Metcalf) owned Production Photo/Graphics, Inc. (PPG), '"a short run photographic printing company"' that provides "point of purchase display graphics to manufacturers and retailers." (*Adbox, Inc. v. Metcalf* (May 30, 2002, B145735) [nonpub. opn.], p. 2.) In 1991, Metcalf and Christer Wernerdal "decided to run a display company together" and created Adbox, Inc. for that purpose. Metcalf was the sole shareholder of both PPG and Adbox, and PPG hired Wernerdal as its employee. Since Wernerdal did not have any capital to contribute to Adbox (only his time and expertise), Metcalf and PPG paid all of Adbox's expenses. By April 1993, Metcalf had advanced about $166,000 for Adbox's expenses. (*Adbox, Inc. v. Metcalf, supra,* at pp. 2-3.)

In May 1993, Wernerdal acquired 50 percent of the shares of Adbox. Metcalf did not pay any money for the shares, but he and Wernerdal executed several agreements, including a "Loan Commitment and Promissory Note" which had attached to it a schedule of the expenses advanced to that point by Metcalf, with interest calculations. Metcalf and PPG agreed to advance funds to Adbox (up to $350,000, including the existing balance), and Wernerdal agreed to '"guarantee the repayment of one half"' of the total amount advanced, plus interest. (*Adbox, Inc. v. Metcalf, supra,* at p. 3.) Adbox was

required to pay Metcalf $175,000 by May 1995, and any remaining balance by May 1996. (*Id.* at p. 4.)

Adbox did not generate much income until the fall of 1993, and did not begin to break even until 1994. It was unable to make the $175,000 payment to Metcalf due in May 1995, and Metcalf continued to pay some of Adbox's expenses through August 1995, and ultimately advanced more than the agreed amount, a total of more than $575,000. (*Adbox, Inc. v. Metcalf, supra,* at p. 4.)

In 1998, Metcalf told Wernerdal he wanted to '"part ways"' and suggested one of them could purchase the other's shares of Adbox. In May, Wernerdal (represented by Nash & Edgerton, LLP) purchased Metcalf's shares in Adbox. The parties signed an "Agreement for Redemption of Stock," pursuant to which Adbox agreed to redeem Metcalf's shares for $200,000, plus interest, by June 2000, and Wernerdal guaranteed that obligation. (*Adbox, Inc. v. Metcalf, supra,* at p. 4.) The Loan Commitment (which at that time had a balance due to Metcalf of about $110,000) was "terminated" and, in effect, replaced by a "Consulting Agreement," pursuant to which Adbox was obligated to pay about $115,000 to Metcalf. (*Id.* at p. 5.)

B.

In July 1998, Wernerdal (still represented by Nash & Edgerton) sued Metcalf and PPG for damages on theories of usury (based on the interest rate payable to Metcalf for the amounts advanced to Adbox), conversion, and breach of fiduciary duty. In August, Wernerdal sought and obtained a preliminary injunction preventing Metcalf and PPG (henceforth collectively

Metcalf) from declaring a default under the stock sale agreement. (*Adbox, Inc. v. Metcalf, supra,* at p. 5.)

Metcalf answered and cross-complained against Wernerdal and Adbox (henceforth collectively Wernerdal) for fraud and conspiracy, alleging that Wernerdal had never intended to pay the amount due under the Consulting Agreement and, with the help of Nash & Edgerton, had intended all along to sue Metcalf for usury. Metcalf twice moved for summary adjudication of Wernerdal's usury cause of action, but both motions were denied.

Ultimately, the case was tried to the court, which found against Wernerdal on the usury claim, awarded damages (about $97,400) to Metcalf under the Consulting Agreement, and otherwise rejected the claims asserted in the complaint and cross-complaint. "[O]n the basis of the equities," the trial court found there was no prevailing party and refused to award costs to Metcalf. Wernerdal and Metcalf both appealed. Division Seven of our court reversed in part and affirmed in part, increasing the $97,000 award to the $115,000 due under the Consulting Agreement, and finding there was, in fact, a prevailing party, and that Metcalf was entitled to recover his fees. The trial court's decision rejecting Metcalf's tort claims was affirmed. (*Adbox, Inc. v. Metcalf, supra,* at p. 20.)

C.

In April 2001, Metcalf filed a petition in which he sought leave to file a proposed complaint against Wernerdal and Nash & Edgerton, alleging they had conspired to harm Metcalf by defrauding him, and by violating various provisions of the Corporations Code, all in breach of the fiduciary duties owed

by Wernerdal to Metcalf. (Civ. Code, § 1714.10, subd. (a) [court permission is required before filing a complaint that charges a lawyer with conspiring with his client].) The proposed complaint alleged that Wernerdal retained Nash & Edgerton to advise him about the shareholder agreement he had entered with Metcalf, and to determine whether Wernerdal might gain a controlling interest in the corporation. To that end, Nash & Edgerton advised Wernerdal to use Metcalf's "marital difficulties to gain control of Adbox" -- and to keep his plans from Metcalf. (*Metcalf v. Nash & Edgerton* (July 1, 2003, B152611) [nonpub. opn.], p. 6.) When the plan to "take over Adbox in [Metcalf's] marital dissolution action did not work out," Metcalf and Wernerdal together asked Nash & Edgerton to review the Loan Commitment agreement, and the lawyers erroneously concluded that Metcalf's loan to Adbox had been made at a usurious interest rate.

In July 2001, the trial court denied Metcalf's petition, and Division Four of our court affirmed that decision, finding that Division Seven's affirmance of the judgment (in the usury action) exonerating Wernerdal from Metcalf's conspiracy and fraud charges barred the action against Wernerdal's lawyers. (*Metcalf v. Nash & Edgerton, supra,* pp. 7-8, 14.) Among other things, the opinion notes that it was Metcalf "who initiated the claims of fraud against Wernerdal and conspiracy between Wernerdal and his attorneys in [his] cross-complaint [in the usury] action. After reviewing the conspiracy claim asserted in that action and the claims alleged here, there can be no serious dispute but that they are the same . . . ." (*Id.* at p. 9.) The opinion also notes that it "would be an absurd result if the alleged principal conspirator could be exonerated from a claim of conspiracy but the attorneys who represented him in that successful defense could thereafter be sued for the same underlying conspiracy. That is a basic

principle recognized by the Legislature in enacting [Civil Code] section 1714.10." (*Id.* at pp. 9-10.)

Division Four refused to permit Metcalf to amend his complaint to add a cause of action for malicious prosecution, suggesting he could -- if he had a meritorious claim of that nature -- simply file a new action. (*Metcalf v. Nash & Edgerton, supra,* p. 13.)

D.

And that is precisely what happened.

In June 2003, Metcalf sued Nash & Edgerton (and the individual lawyers who represented Wernerdal) and Wernerdal for malicious prosecution and conspiracy to maliciously prosecute the underlying action.[1] The first cause of action alleges that the usury action was brought without probable cause, the second that they did the same thing after conspiring together to do so to harm Metcalf.

Nash & Edgerton and Wernerdal (henceforth collectively Wernerdal) moved to strike the complaint (Code Civ. Proc., § 425.16), contending the malicious prosecution action is subject to the anti-SLAPP statute, that there was probable cause to bring and continue to prosecute the usury action, and that Metcalf could not possibly prevail in this action. Over Metcalf's opposition, the

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[1] Wernerdal's wife, Robin Whitburn, is also named as a defendant. She is included in our references to Wernerdal.

trial court agreed, granted the motion, and dismissed the action. Metcalf appeals.

DISCUSSION

In a series of related arguments, Metcalf (by failing to contend otherwise) concedes the application of the anti-SLAPP statute (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087-1088) but contends the usury action was brought without probable cause. We disagree.

A.

Metcalf's concession that his malicious prosecution claims arise from a protected activity means that Wernerdal has met his burden, and that the action can go forward only if Metcalf has established a "probability of prevailing on [his] claim[s]." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) The question, then, is whether the record includes admissible evidence proving Metcalf's claim that the usury action was brought without probable cause, initiated with malice, and terminated in his favor. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871.) More specifically, the issue here is probable cause, and our inquiry is about whether, on the basis of the facts known to Wernerdal at the time the usury action was filed, that action was legally tenable, keeping in mind that probable cause may be present even where the action lacks merit -- and it is only when "*all* reasonable lawyers agree totally" that a case lacks merit that probable cause does not exist. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.)

B.

Three events in the usury action -- the issuance of the preliminary injunction and the two denials of the motions for summary adjudication of the usury claim -- establish that the usury action was filed and prosecuted with probable cause. (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357 [the issuance of a preliminary injunction conclusively establishes probable cause for bringing the underlying causes of action]; see also *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 819; *Cowles v. Carter* (1981) 115 Cal.App.3d 350, 354.)[2]

Metcalf asks us to ignore *Fleishman* on the ground that the preliminary injunction and the summary adjudication orders were obtained "based on knowingly false allegations." That we cannot do. In the absence of any evidence suggesting the preliminary injunction was obtained by fraud or perjury (and the trial court expressly found there was no such evidence), the fact that Metcalf ultimately prevailed at trial adds nothing to the probable cause analysis. (Cf. *Cowles v. Carter, supra,* 115 Cal.App.3d at p. 354.) We consider it significant that the trial court in the usury case expressly rejected Metcalf's tort claims for fraud and conspiracy, and that Metcalf has at no time since then offered a shred of evidence to support the allegations he made in his conspiracy case or those that he now makes in this action.

This is not a close case. (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 65 [the "several references in *Sheldon Appel* to

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[2] Metcalf's opening brief focuses solely on the usury claim in the underlying action, and he does not discuss the merits of any other claim alleged by Wernerdal in that case. We follow his lead.

freedom from 'unjustifiable' and 'unreasonable' litigation suggest the continuing validity of the rule that a prior determination of 'probable cause' cannot be second-guessed in a malicious prosecution action even where the judgment in the underlying action is reversed on appeal"]; *Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 819 [the denial of the motions for summary adjudication were a '"reliable indicator that probable cause [was] present"'].)

DISPOSITION

The judgment is affirmed. Wernerdal is awarded his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

MALLANO, J.